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Evidence and Ethics in Infrastructure Planning

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Abstract

Motivated by criticism of the new infrastructure planning process, the paper considers the role of the Infrastructure Planning Commission and National Policy Statements. Drawing upon lessons learnt from other jurisdictions where similar legislation, structures and procedures have been operational for some time, emerging issues regarding policy, practice and the role of participants are considered through an empirical investigation, in the context of professional ethics, legitimacy and evidence-based decision making. Remedies are suggested to potential operational problems and issues of structural concern are identified which have ramifications for wider planning practice.

Introduction

Evidence based decision making currently lies at the heart of decision making in operational planning practice and nowhere is this more significant than in infrastructure planning. Despite the UK government's commitment to such an approach, serious questions have emerged over the activities of both policymakers and decision takers. In this context, as serious questions have been asked regarding both the layer of governance devised to act as an Infrastructure Planning Commission (IPC) and the associated policy framework employed to guide the decision making process, it is an opportune time to scrutinise the activities of both politicians and planning professionals tasked with decision making. This is particularly important in the case of the latter, bearing in mind that their primary responsibility, in line with the Professional Code of Conduct (2007) of the RTPI, is not their employer but to carry out their duties for the benefit of the public.

Drawing upon evidence gathered from a range of professional planning practitioners and lessons learnt from the work of similar autonomous agencies in other jurisdictions, the purpose of this paper is, therefore, fourfold. Firstly, at an instrumental level to examine the issues surrounding the legality and legitimacy of the IPC and policy framework; secondly, to identify ethical challenges likely to be faced by planning professionals conducting the work of the IPC; thirdly, to scrutinise the consultation procedures which will be used to formulate the evidence-base for decision making; and finally, to explore how knowledge is created, imparted and interpreted by stakeholders involved in the infrastructure planning process. It is anticipated that not only will the outputs provide clarification on a number of areas where there is confusion and upfront remedies to likely operational problems, but will also draw attention to wider structural concerns which need to be addressed to ensure that the legitimacy of the UK planning system is not undermined and perceived as premised upon ethical fantasy.

In the first instance, it is therefore important to contextualise the investigation by considering the role of legitimacy and ethics in planning policymaking and decision taking.

Legitimacy and ethics

The concept of legitimacy theory is one which is widely applied yet frequently poorly defined. Hybel's (1995) perspective reflects this, explaining how "as tradesmen of the social science have groped to elaborate theoretical structures with which to shelter their careers and disciplines, legitimation has been a blind man's hammer" (1995, p. 241). It is nonetheless a useful construct to scrutinise decision making in planning processes where the actions of professional practitioners and elected representatives are inextricably linked. Tilling (2004) identifies how it is misleading to think of legitimacy theory in terms of a theoretical perspective per se, but rather how it is important to think of two operational levels. Institutional Legitimacy considers how organisational structures such as government receive endorsement through the electoral system and are thereby empowered to take decisions (Suchman, 1995). As Beetham (1991) explains "where power is acquired and exercised according to justifiable rules and with evidence of consent, we call it legitimate" (1991, p. 3). Questions which will be raised in the empirical investigation regarding these justifiable rules and the parameters of power therefore include, does such empowerment legitimise government to make any decision regardless of the consequences; and, where exactly does the ethical boundary lie for decision takers and when should it not be crossed? Strategic Legitimacy is applied at an organisational level. Kapland and Ruland (1991) explain that this is underpinned by the seeking of societal approval. Such organisational legitimacy is, therefore, manifested in the ethos of professional institutes, such as the RTPI, where legitimacy for survival is dependent upon the maintenance of integrity. Again, therefore, the study seeks to establish the ethical framework within which both the IPC and planning professionals in the wider context must operate.

The common theme in both cases is the public interest which Alexander (2002) relates to sound government for elected representatives and prescribed actions for public officials. The linkage between planning and the public interest is explained by Campbell and Marshall (2002) as being manifested in development management and land-use planning, while Howe (1994) perceives its consideration as an ethical prerequisite of professional planning practitioners. In the case of both democratically elected representatives and professional planners there is a powerful resonance of ethical consequentialism underpinned by utilitarian principles whereby the actions by each should be in pursuit of maximising positive consequences when pitted against negative, optimising impacts upon human welfare and producing the maximum net benefit for the majority in the long term (Taylor, 2009). It will become apparent that the challenges presented for professional planners in the IPC, where their role ranges from expert adviser to decision taker, and private sector consultants who advise clients and interact on their behalf with the IPC have wider resonance for the planning profession.

For professional practitioners the ethical benchmark is delineated by the Code of Conduct of the RTPI which aims to "advance the science and art of town planning for the benefit of the public" (RTPI, 2007, p. 1). Sheridan (2010) explains how expertise and knowledge are "makers of RTPI membership" (p. 24), but planning professionals are constantly challenged by ethical issues extending beyond the remit of expertise and knowledge. In this context, the seminal work of Marcuse (1976) scrutinises the ethical implications for planners at a more substantive level and poses challenges to practitioners which might help them to better understand what is demanded by the profession. It is, for example, incumbent upon them to have a fundamental understanding of public sector decision making processes and with this comes a responsibility to provide advice with honesty, integrity and, of course, in the public interest, no matter what the ramifications of doing so for their personal financial gain or career development. While exemplary behaviour such as this might reasonably be considered as a manifestation of fearless speech (Foucault, 1983), it is demanded in all walks of the profession from private sector practitioner to local government planner and right to the highest level of government adviser. While allegiance is imperative, with planners unreservedly respecting client confidentiality in delivering their duties with due diligence (RTPI, 2007), advice must always be of the highest integrity even when it may not be what the client wants to hear. Mizzoni (2010) indicates that while this relationship is of paramount importance when the employer is legitimised through the democratic process, it should not diminish in any way the requirement upon the professional to dissent when it is evident that inappropriate interpretation of evidence which may be injurious to the public interest has occurred.

A further salient issue emerging in the context of this investigation is how or whether the ethical obligations of the professional planner are captured by the balance sheet model of the accountant, where it is imperative that there is comprehensive disclosure of all evidence, or whether, as in the case of the lawyer, evidence is collated, analysed and delivered as a partisan advocate, consequently neither impartial nor even-handed (Marcuse, 1976).

It will be seen that the ramifications of this construct differ significantly depending upon the role of the professional planner and, worryingly, while there is evidence to the contrary, professionals must not cross the ethical boundary from tactically manipulating evidence to, what is referred to by one respondent as “falsifying the truth”.

Ethics and legitimacy cannot however be considered in isolation as they are dependent upon knowledge which is in turn dependent upon evidence and how this is created, interpreted and imparted.

Evidence in policymaking and decision taking

The concept of the use of evidence and research has been emerging as a dominant paradigm, at European and UK levels, for over a decade now. Solesbury (2002) highlighted how the concept first appeared explicitly in the UK Government's White Paper on Modernising Government (Cabinet Office, 1999) which stated that policymaking is “the process by which governments translate their political vision into programmes and actions to deliver 'outcomes' - desired changes in the real world” (p. 21). The process of policymaking is unquestionably a complex one but government thinking is that policymakers should have available to them the widest and latest information on research and best practice, and all decisions should be demonstrably rooted in this knowledge. The concept is however a more complex equation than one remedied through a rational comprehensive approach. The simplicity of a procedural planning based approach (Faludi, 1973) belies the myriad of factors which provide the policymaking constructs. In this context, the framework provided by Young et al (2002) offers a useful lens to scrutinise a continuum of evidence-based strategies. Five approaches to policymaking are identified along a spectrum beginning with the knowledge driven approach in which the professional expert has total autonomy in determining policy.

The second approach, problem solving, identifies the heavily weighted role of commissioned research in driving government decisions. Thirdly, the interactive model is underpinned by dialogic processes between experts and government, whereby there is an equitable balance between the evidence and the role of the decision maker. The fourth approach, the political tactical model, sees a paradigm shift towards a politicisation of the entire process with less dependence upon evidence gathered and analysed by professional experts and a shift in autonomy to the political decision maker. Finally, in the fifth approach, labelled enlightenment, research is evidence-informed but not necessarily evidence-based. Schulock (1999) explains that, in this scenario, the objective is to foster a deeper understanding of the underlying dynamic and circumstances, with the value of research evidence being its contribution to informed discursive processes.

Whatever the weighting of the evidence upon which policy is based or informed, caution is required in its acquisition and analysis; and the location of the planner along this continuum in no way undermines the fundamental importance of remaining cognisant of the explicit requirement of precedence of the public interest over paymaster. The work of Solesbury (2001) reverberates with this in highlighting a range of questions which must be asked when employing evidence to shape policy or practice. In the context of this research such questions include: how relevant is the evidence to what we are trying to understand? How representative is the information or data and, perhaps most importantly, how reliable and well-grounded is the information? Such questions are essential in developing evidence-based policymaking and resonate with how knowledge is created, gathered and interpreted in planning decision making arenas. A key departure point for the investigation is therefore to scrutinise the role of the IPC in making decisions based upon the National Policy Statements and evidence gathered from other sources including statutory consultees and representations from the public. How evidence is gleaned, its comprehensiveness and accuracy are, therefore, matters of critical importance.

Rydin (2007) explains the significance of such matters in her consideration of how knowledge is fed into regulatory arenas by the participants. In any form of planning decision making it is apparent that multiple layers of knowledge are inputted from both professional and lay stakeholders, with all having the potential to contribute to a substantive understanding of the issues under scrutiny (Wynne, 1996). Inevitably, however, the greater the volume of such information, the greater the difficulty in subsequent analysis. Notwithstanding the fact that voluminous rafts of evidence create analytical complexities, the problematic is compounded as, inevitably, the evidence-base can be permeated with fuzzy and corrupt knowledges (De Roo and Porter, 2007). The explanation for the presence of such information can range from poor presentation and unwitting error through to the flagrant submission of fraudulent material by any stakeholder, whether professional or lay (Sandercock, 1998).

While severe ethical questions emerge for professionals who wilfully impart distorted knowledge (McKay, 2010), the difficulty in unpacking the truth is compounded for the inquisitor. The inference for planning practice is, therefore, that those best qualified to undertake such tasks should be provided with the most appropriate tools and allowed to conduct their investigations in the most appropriate arena. Nowhere are such matters likely to be of greater significance than the determination of planning applications for major infrastructure projects. It is with these matters in mind that attention turns to the role of the IPC, the appropriateness of its decision making processes and the implications of NPSs.

The role of the IPC

The IPC¹ is comprised of around forty planning commissioners, appointed by the Secretary of State, who take decisions in their relevant fields of expertise on matters of transport, energy, waste or water. On complex applications the onus may switch from single commissioner decision making to a panel decision with up to five commissioners involved. The new consent process differs from normal planning permission in that it captures the full range of consents required under the older system, thus endeavouring to circumnavigate the disjointed incremental approach to approval which took a protracted period of time to complete. The process, which is the subject of much concern (Scotland, 2010), takes place in six stages, the first of which is pre-application, a process explicitly targeted at public consultation. Onus is upon the applicant to demonstrate to the IPC that an appropriate level of consultation has been conducted with the relevant local authorities, statutory consultees and any party having an interest in the land. In addition, a statement of community consultation (SOCC) is drafted by the applicant, agreed with the local authority and published in the area affected by the proposed project. The applicant should then incorporate feedback into the final submission. As major concerns have been voiced regarding weaknesses in the consultation process (Donatantonio, 2010), the issue is scrutinised in the empirical investigation.

At the application acceptance stage, it is incumbent upon the applicant to submit a consultation report which demonstrates that the pre-application publicity requirements have been adhered to. If all requirements have been met the application may be formally accepted. This is a critical juncture, as it is at this point that the IPC must “responsibly decide” (Kalenka and Jennings, 1999, p.135) if adequate consultation procedures have been put in place. If deemed acceptable the applicant must then formally notify all relevant parties, publicly advertise that this is the case and invite representations to be made to the IPC. The IPC takes a proactive role thereafter determining, in the first instance, if the application is to be considered by a single commissioner or panel. Where no NPS is in place the ultimate decision is taken by the Secretary of State. Based upon representations made, a meeting is held to which all interested parties are invited and on the basis of this, details for examination are determined.

The preferred *modus operandi* to deal with emerging issues is written representation, though hearings can be held to unpack specific issues, if deemed appropriate by the IPC. Importantly, there is a right to be heard through an ‘open-floor’ format process whereby an interested party is entitled to explain specifics to the IPC. In such cases the format of the hearing will be determined by the IPC which, though inquisitorial is, as far as possible, not adversarial. Importantly, cross-examination can be permitted if it is felt appropriate to test the evidence presented. Evidence testing is a key strand to the investigation as it knits skills, knowledge and values of planners bound by the ethical code of the profession with the methodology employed to unpack the truth. On completion of the examination the decision is taken by the IPC Council (single commissioner decisions), the panel or Secretary of State and can only be challenged within six weeks via judicial review. The study will show that the how and why of evidence-based (or informed) decision making weave succinctly with the ethical and legitimate responsibilities of those empowered with such tasks.

Interestingly, the concept of dealing with infrastructure proposals of national importance in this way is not unique to England and Wales. A similar framework has been developed in the Republic of Ireland (Ireland) as a result of the Planning and Development (Strategic Infrastructure) Act 2006 which might provide the IPC with valuable insights into the challenges it is likely to face and, in some instances, lessons might be learnt.

¹ Subsequent to the completion of the investigation the decision has been taken to abolish the IPC and powers are being passed to the Planning Inspectorate for England and Wales which is an Executive Agency of the Department for Communities and Local Government (DCLG) and of the Welsh Government.

As with the IPC, proposals for major projects are made directly to a single independent body, An Bord Pleanála (ABP), the existing appellate body, which determines the applications. Originally, the proposal was to establish a Critical Infrastructure Board, but this was rejected in favour of using the framework and skill sets already provided by ABP. Interestingly, prior to and since the enactment of the 2006 legislation, similar concerns have been raised in Ireland relating to the legitimacy of a one stop development consent process characterised by an increased cutting of red tape and reduced levels of stakeholder engagement (Flynn, 2006). Of equal significance is the role of the Planning Appeals Commission (PAC) in Northern Ireland (N.I.). The PAC is an independent appellate body which can deal with any major planning application by holding an independent examination or public inquiry, subsequent to which a report is passed to the Department of the Environment for decision. The activities undertaken by the PAC, skills employed and methodologies used mirror strongly those captured by the framework underpinning the IPC. It will be seen that the IPC can learn important lessons from the legislative mechanisms on the island of Ireland not solely in terms of signposting how to robustly conduct inquisitorial activities within legal parameters, but how to nurture a perception which instils confidence in the public that it is delivering its responsibilities to the highest ethical standards.

Despite the serious ramifications of the current economic crisis, the UK Government continues to stress that it remains committed to the principles of sustainable development (DEFRA, 2009). One of the four key areas prioritised for action in pursuit of this overarching goal is climate change and energy. In terms of energy provision the strategy devised to address the challenges faced is underpinned by two key goals, the first of which is to cut CO₂ emissions by 60 per cent by 2050, whilst the second is to provide a security of supply. While there is much to admire in the ethos of these aspirations, questions have been raised over their compatibility. With regard to security of supply problems, serious concerns have already been raised that, unless something can be done to increase energy supply immediately, the lights will begin to go out over the UK by 2016. In pursuit of remedying this, Government has indicated that it will fast-track the construction of a suite of nuclear power stations by a process which some consider to circumnavigate robust planning processes. Such strategies question firstly, whether the explicit goals set out to protect the environment are in danger of becoming peripheralised, and secondly, whether the integrity of the planning system and those who operate it is being undermined. These combined factors call into question the fundamental principles underpinning the planning function and it is in this context that the legitimacy, legality and ethics of the system will be scrutinised, specifically within the realms of the first of the draft NPSs, NPS 1: Nuclear Power Generation.

The research approach

The impetus for the investigation emerged from observation of developments in Ireland prior to and since the introduction of the Planning and Development (Strategic Infrastructure) Act 2006 (Flynn, 2006). Coupled with the publication of a study of the efficacy of decision making by independent appellate bodies in N.I. by McKay (2010), the implications of the enactment of the Planning Act 2008 provided a timely departure point for scrutinising the processes employed to determine strategic infrastructure applications in England and Wales.

In the first instance a review of legislation, draft policy and literature identified a range of issues which were captured under a series of headings relating to legitimacy, ethics and the use of evidence. Similarly, the literature pointed to concerns raised and comments made by 25 key stakeholders who either represented professional organisations, public interest groups or who had been affiliated to government departments informing the process in the lead up to the legislative change. This motivated the researcher to attempt to engage in dialogue with these and a range of other holders of relevant expert knowledge using a variety of methods including face to face discussion, telephone and email (Blaikie, 2000). Subsequently, a number of key themes were crafted which were explored in a series of discussions with professional planning practitioners and elected representatives.

Attempts were also made to engage with experts who have publicly expressed criticism of the IPC and/or NPS process, but none of these were prepared to expand on their original general criticisms, a factor which, in itself, is of interest to the study. Subsequent to drafting the research findings a focus group was established comprising one commissioner, two practitioners and one academic. Each was provided with a briefing paper in advance of a round table discussion which enabled the outputs to be evaluated.

Legitimacy and ethics in policymaking and practice

The first issue emerging is the “blind man’s hammer” (Hybel, 1995 p.241) of legitimacy which captures a raft of matters in the context of this investigation.

One of the initial concerns raised regarded the IPC and its legitimacy to operate as a corporate decision making body. Gallimore (2009), for example, explains how it might be believed that it does not have a democratic mandate, mirroring the plethora of comments made in Ireland regarding the role of ABP. While, interestingly, this was mooted as an issue by five respondents: three private consultants and two elected representatives, all of whom questioned the lawfulness of the organisation, in practice this is unlikely to be a cause of substantive concern. The most significant point made was that the policymaker and decision taker were one and the same, specifically with reference to the ministerial role in decision taking. The remedy to this conundrum is embedded in theory and law. Firstly, the IPC is an organisation appointed by government and hence, albeit indirectly, is legitimised by the electoral mandate provided to the appointing ministers. Secondly, the allegation that the minister is assuming conflicting roles as policymaker and decision taker, in contravention of Article six of the Human Rights Act 1998, which states that everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, is refuted by the ruling set out in *R (Alconbury) Developments Ltd. v Secretary of State for the Environment* [2001]. The ruling in this case is that if there has been procedural impropriety there is a ready vehicle to challenge provided by the judicial review process. Importantly, however, one point frequently raised, described by a PAC commissioner as “the injustice dimension to judicial review”, was the prohibitive cost of the process. The majority of those likely to be affected were considered by respondents to be on moderate incomes, not entitled to legal aid and, consequently, incurring such expenditure is not an option.

Legitimacy however, as explained, is a construct which impinges upon planning at all levels including policymaking, where the interactive dynamic between professionals and elected representatives is core. The scale and degree of impact by planning professionals sits somewhere along Young et al’s (2002) policy continuum and where exactly they are located can have significant ramifications for the ethical practices of practitioners. This is of particular interest in the scrutiny of the NPSs, specifically their preparation and content.

One of the key concerns about the NPSs is the fact that a formal SEA is not conducted, but rather an Appraisal of Sustainability (AoS) which is explained by the DECC as “conducted in such a way that it incorporates the requirements of the Strategic Environmental Appraisal Directive” (DECC, 2010 p. 1). Opinion on the rigour of this preferred approach is, however, divided. Philips (2010), for example explains that, as the NPSs will have unprecedented weight in determining applications, SEA is imperative. One of the key issues raised in the context of the first draft NPS on nuclear energy is that the DECC has refused to assess different policy options and evaluate alternative ways of delivering existing policy options. Philips (2010) explains that the consultants proposed 17 policy alternatives for evaluation yet the government found none reasonable and refused to evaluate them. Directive 2001/42/EC demands the development of strategic alternatives and evaluation of predicted significant effects. If this is as it seems and the requirement has not been complied with, then serious questions emerge. On the necessity for SEA per se it was explained, by one of the DRDNI respondents, that the key statement in the Directive is that “SEA is mandatory when setting a framework for decision making”. It was stressed that the process adds substantive value as it is not only a key mechanism for generating expert knowledge, but a critically important component in the overall consultation process. Omission or dilution was perceived by the respondent as, albeit technically legal, “a fundamental and potentially fatal flaw in policymaking processes”.

It was stated that it only “kicks in legally” when there is a geographical dimension to proposals. In cases of NPSs therefore, where there is “no geographic address”, it was stated that “it is a framework for policy – not decision making” and there is “no grip for the EU Directive to be enforced”. An example provided was the Scottish National Planning Framework (NPF) 2 which mentioned particular sites for national infrastructure projects. The SEA on the revised NPF was rerun as it was mandatory to take account of the additional sites proposed during consultation. In naming nuclear sites under draft NPS 1, therefore, a framework is being set so there is “grip” and consequently accurate transposition of the legislation is imperative. In N.I. doubt over appropriate transposition of the SEA legislation provided the impetus for a series of judicial reviews which placed much of the policy framework in limbo, significantly reduced public confidence in the planning authority and called into question the legitimacy of the entire planning system. This turmoil has been perpetuated and intensified by question marks over integrity which are discussed later in the paper. If it is true that the government has not properly taken on board the requirements of Directive 2001/42/EC in draft NPS 1, a number of matters arise.

Firstly, there is a significant possibility that the NPS is unlawful, a situation which once again opens up the potential for judicial review; and, if this is the case, a raft of additional substantive questions emerge. Firstly, if those responsible for the drafting of the NPSs were cognisant that the appraisal methodology employed was “fundamentally and fatally flawed”, why did they employ it? Why did they not simply conduct a full SEA? One point made, perhaps ironically as it came from a public sector practitioner, is that the underlying tactics of the decision makers may have been to circumnavigate a potential minefield which would have put the predetermined, desired outcome at risk. If this is the case it is important to assess what evidence was produced, what guidance was provided, by whom and what weight was attached to it? These questions were put to DECC, but as no definitive explanation was provided, questions remain unanswered and concerns which must be addressed. If the professional planners were responsible for the gathering and analysis of evidence, subsequently providing guidance to their political masters for decision making, a number of scenarios emerge.

In the first instance if the professional planners believed and advised that an AoS was an acceptable way of meeting the requirements of the SEA Directive then what they have done might be reasonably considered to be legitimate and ethical. In any other circumstances, however, serious ramifications emerge for the legitimacy and ethics of planning professionals. In this context if the planners were cognisant that a full SEA would torpedo the outcomes desired by their political masters and advised on how to circumnavigate the rigorous procedures, a crisis of ethics emerges. While there is an obligation of loyalty to the political master (Marcuse, 1976) there is an obligation to dissent when it is believed that such advice might run contrary to the public interest. Failure to advise on a full SEA, when knowing it to be the right and proper thing to do, flies in the face of the overarching principles of sustainable development which are specifically referred to in the NPS statement of AoS (DECC, 2010 p. 1).

As a consequence of these findings, an opportunity was taken to establish whether there might be lessons for wider practice by asking the public sector professional planners whether they had ever been placed in positions where they had felt pressurised to make decisions which ran contrary to their professional belief. Interestingly, while none indicated that this had been experienced at strategic level, three of those interviewed in N.I. specifically referred to the development control process. When the planning authority formulates an opinion to go before council, the evidence has been collated and site inspected. The application is considered by a Development Management Group (DMG) comprising three members, usually of different ranks, one of whom is of senior level. The decision of the group is verified in a “signing off process”, where each of the three team members signs the decision sheet. The key point made by each respondent was that, on occasion, they disagreed with the opinion of the more senior member but felt uncomfortable expressing such opinion and consequently “signed off” the decision.

This point is particularly interesting in the light of a recent application which came under scrutiny for a proposed housing development on the site of Knock Golf Club in Belfast. One of the DMG members, while “signing off” the decision to approve, was so opposed to the interpretation of evidence and opinion to approve, that he scripted details of his discontent adjacent to his signature. The evidence interpretation is currently under extensive public and legal scrutiny and while the application had been forwarded to council with a recommendation to approve, a decision to issue has been withheld pending further investigation. Inevitably, attention turned to discussion of this case with all professional respondents and the overwhelming consensus was that, while the fearless speech (Foucault, 1983) of the officer who expressed dissent had been courageous, few would have done the same, fearing that such action could seriously damage their career prospects.

The impact of the planner in terms of evidence-based policy making, therefore, also takes on various degrees of significance depending on where they are located along Young et al’s continuum (2002). If the expert is “on top” the impacts of unethical advice could have serious long term detrimental impacts, whereas if the role is one of “enlightenment” the impact of such advice may be less consequential in that the decision maker may use it as one source of information, preferring to balance the decision with other sources of evidence. In either context, however, such practice is unethical and undermines the legitimacy of the professional planner. It must not be forgotten of course that planners in the role of policy informers may have advised tactics and strategies which respect the principles of sustainable development, whatever the implications for the desired outcomes by the decision makers. In such a scenario the profession can rightfully claim organisational legitimacy.

While the role of the planner is worthy of scrutiny, so too is the role of the decision maker, in this case the political master. This is particularly important in the context of both the political tactical model and enlightenment (Young et al, 2002), as it is in these scenarios that democratic power takes on an authoritarian status. The key issue emerging in this context is the government dictum that unless new sources of energy are supplied by 2016, the UK will face serious shortages, consequently, there is no alternative but to fast track the construction of nuclear power stations. Such statements sit comfortably with neither the principles of sustainable development nor the requirements of planning and environmental regulation. The inference is that the goal must be achieved at any cost and planning must not stand in its way, a premise which fundamentally prejudices the crafting of any sustainable NPS on nuclear energy provision. If this is true, questions must be asked of the legitimacy of the elected representatives who make the decisions and, specifically, where the ethical boundaries lie with regard to decision making.

Here again the underlying processes are veiled in mist, but it is possible to surmise that if there is, in reality, no alternative but to fast track nuclear power station construction by circumnavigating the planning system, perhaps institutional legitimacy facilitates considering such tactics as ethical – the consequences of the lights going out might justifiably outweigh a more rigorous assessment process. On the other hand if, as indicated by evidence from, for example, Tindale (2009), UK Green Building Council (2010) and the Zero Carbon Hub (2010), the UK can generate the requisite amounts of energy using a range of renewable sources, questions emerge surrounding the parameters of ethics and legitimacy for elected representatives. The evidence for circumnavigating methodologies designed to foster sustainable development by the most significant level in the hierarchy is at best questionable and at worst the application of political tactics (Young et al, 2002) to mask the truth.

Consultation procedures and interpretation of information

Attention now turns to criticisms surrounding consultation, the assimilation and analysis of knowledge and information. In this context there are different types of knowledge which take on paramount importance in the decision making arena (Hillier, 2003), professional and lay knowledge (Rydin, 2007) and the complexity of identifying which is most appropriate (Alexander, 2008) adds substantively to the problematic. Furthermore, the difficulties experienced in power-laden decision making fora (Tewdwr-Jones and Allmendinger, 1998) are exacerbated by a potential dearth of key information as a result of significant exclusions. Similarly, the absence of key information in the decision making process mirrors issues raised by Flyvberg (2002) who highlighted concerns about the “marginalised other” being omitted from the planning process. Such stakeholders might include those who are unaware of the proposal, lack the understanding of processes at work and the inherent consequences; and/or, who are unable to represent themselves in decision making arenas. These concerns fostered an exploration into the adequacy of the consultation process in endeavouring to decipher whether there are justified concerns over the types of information (professional and lay), their comprehensiveness and quality, and also how they are interpreted.

The first issue to be scrutinised in the context of draft NPS 1 is the theme of nuclear waste handling. While in terms of environmental protection this is a matter of paramount importance, concern has been raised by experts as to how this is being dealt with by planning. Most importantly, former experts in CoRWM have expressly criticised the interpretation of information provided to government, specifying that the information did not relate to new build nuclear stations. While contact was made with one of the leading critics requesting clarification and expansion of the concerns, nothing further was added to the original comments. The interpretation of evidence provided has resulted in the issue of waste being excluded from the draft NPS. CoRWM was contacted in an attempt to unpick these concerns but while a response was provided, it failed to definitively prove that the dissenters had erred in their criticism. CoRWM did not express any criticism of any party, a position which raises more questions than it answers. If the dissenters had been inaccurate, why was this point not made transparent? If there has been a misunderstanding of the advice given to government, why was this not clarified? Anything less than a transparent, comprehensive explanation of the facts raises, at best, issues of concern on knowledge creation, transfer and interpretation. At worst there are questions on ethics and legitimacy to be answered by CoRWM, particularly if there are matters at issue on the handling of nuclear waste materials.

Serious criticisms of the public consultation process on actual infrastructure consent applications have emerged from a number of sources (Scotland, 2010), the key question being, without adequate consultation how can appropriate evidence be collated?

The Town and Country Planning Association (TCPA), for example, has stated “communicating national policy to communities is acutely important, since these issues cannot normally be reopened by the IPC once settled by the NPS” (Donatantonio, 2010 p. 1). Despite these the documentation on participatory processes places the onus upon the applicant to conduct these processes rigorously. Therein appears to lie the area of greatest criticism. While the TCPA issue was not perceived as significant and considered by one commissioner as “perhaps an exaggerated overreaction”, discussions with the public and private sector planners, commissioners and inspectors yielded an inference that the beneficiary of the development process cannot be relied upon to comprehensively seek out knowledge and present the findings in a transparent, truthful and impartial fashion.

One issue of concern which did emerge was the iterated opinion that those who would be conducting the process, whether professional planners or otherwise, would be at the behest of their client and consequently challenged to strategically seek out and present only information which suited the cause, or tactically manipulate information to meet the needs of the client. It was remarked that the process had “put the poacher in charge of game keeping”. Once again this reverberates with the comments by Marcuse (1976) that while there is an ethical obligation of loyalty from employee to employer, there is also obligation to dissent. Two issues are of concern in this context. Firstly, that professional practitioners would act in anything less than an ethical fashion and secondly, those expressing the concerned opinion were also professional practitioners, with extensive experience of working with private sector planning professionals. Importantly, overwhelming opinion was that such practice would only occur in a minority of cases. Nonetheless, the inference is that such practice does occur and it is, therefore, essential that the professional regulators take cognisance of such matters.

Returning to the issue of the procedures in place for consultation, it is apparent that the consultation process will be heavily policed, firstly by the relevant local authorities, via the SOCC, and secondly, through the verification process within the IPC. While the process is new and it was suggested that it will require a substantive period of piloting, it was generally welcomed by the respondents as innovative and proactive, though a number of public and private sector professionals stressed that this is the critical juncture in the infrastructure planning process and the test will be for the IPC to “responsibly decide” (Kalenka and Jennings, 1999, p.135) if adequate consultation procedures have been put in place. The point was made by one respondent that the “devil will be in the detail” and in this context policing, subsequent to validation of the process by the IPC, will have to ensure that a comprehensive body of both professional and lay knowledge (Rydin, 2007) is provided; and that, while the Lacanian Real (Hillier, 2003) is likely to remain unattainable, as far as reasonably possible those who have valid contributions are not marginalised from the process (Flyvberg, 2002).

The IPC and operational practice

As the IPC embarks on its decision making journey lessons might be learnt by importing findings on the activities of the PAC across the Irish Sea where insights can be provided into what might lie ahead. The PAC is staffed in a similar way to the IPC and is guided by similar principles. Furthermore, in terms of dealing with major issues its preferred modus operandi is the independent examination methodology, an approach not dissimilar to that which will be employed by the IPC. The investigation revealed a number of prizes and pitfalls which might, therefore, be taken cognisance of by the IPC as it beds in.

The first area to be considered here links back to the consultation process and gathering and admission of evidence. The research indicated that greatest dissatisfaction expressed by stakeholders and participants in the examination process stemmed from the prescriptive approach taken by some commissioners. The key issue related to the fact that circumstances could change dramatically in the intervening period between submission of written evidence and its consideration. Sometimes it was felt that when this was the case and participants endeavoured to submit additional new information, they were precluded from doing so. The counter to this was that commissioners indicated that they only excluded such information if it was new to the inquiry and could have been entered at the appropriate time. This is the context for the second issue of complaint whereby a number of stakeholders indicated that if they had, in error, failed to include information in their written statements, they were subsequently precluded from doing so even though it was considered by them to be of critical importance in the decision making process, precipitation of the Lacanian Real (Hillier, 2003)? Interestingly, there is a significant difference in the Irish system, as if someone misses the period allowed for making submissions, while there is no automatic right, ABP has discretion to enable such parties to be heard in the interest of justice.

One further matter of interest emerging from the Irish system is that those parties making submissions on applications for strategic infrastructure are charged a fee of fifty euro. Significantly, almost all respondents felt that this was an innovative suggestion as it ensured that only those with genuine concerns were prepared to make submissions, while it simultaneously provided a sufficient deterrent to the lodging of frivolous comments.

The second issue to be explored related to the suitability of an independent body with executive powers to deal with major strategic applications. The evidence from Ireland and N.I. provided some interesting findings and, in particular, the fact that ABP is comprised of professional planning experts (known as inspectors) some of whom are part-time, remain in private practice and consequently still submit planning applications. On the other hand the employees of the PAC are mainly full time commissioners and anyone who is not a commissioner must not have any involvement with private practice. Conflict of interest requirements do apply in each jurisdiction and, while none questioned the integrity of inspectors/commissioners, the point was made that perhaps it might be more appropriate for inspectors in Ireland to have no outside involvement with planning matters. In both cases the discussions indicated that the skill sets of the officers were generally exceptional with appropriate levels of knowledge to engage with key planning matters, coupled with verbal inquisitorial excellence to lead discussion and probe for deeper knowledge when required. Most importantly, however, there were no significant concerns of impropriety on the part of any officers engaged in the process. The public perception of skill and integrity is a very positive indicator for the future of the IPC. Indeed the perception that ABP and the PAC operate with the highest ethical standards has fostered a culture where their legitimacy has not been called into question.

These findings are particularly significant at a time when public sector planners and elected representatives have come under extensive criticism in Ireland, where prosecutions have been upheld by the Flood Tribunal, and also in N.I. where, in the case of the aforementioned Knock Golf Club housing scheme, decision making procedures have been extensively called in to question. Perversely, concerns over legitimacy and ethics have been expressly directed at the planning profession, almost to the exclusion of the independent bodies which are perceived as paradigms of good practice.

An associated issue which emerged queried why strategic infrastructure proposals did not simply fall to the Planning Inspectorate as in Ireland and N.I.? The supporting point made was that there would be a much wider body of qualified professionals, with an extensive range of skill sets, who could quickly be called upon to deal with cases where circumstances knitted with such capabilities. The IPC is limited in size and consequently, while staffed with high quality personnel, may not have the breadth and depth of knowledge and skills provided by the Planning Inspectorate. In this context the key issue raised with regard to integrity, was that by compartmentalising the decision making process and keeping it in-house, with dedicated professional civil servants given the task of expediting decisions, it may be easier to move swiftly over matters which would normally be contemplated for much longer periods of time by the Planning Inspectorate. The concern was whether commissioners would be placed in the invidious position of being expected to endorse proposals to satisfy their superiors or political masters, despite the evidence? Should this emerge the commissioners must have the courage to dissent regardless of the implications for their career development. Failure to do so will ultimately not only undermine the legitimacy of the IPC but the planning profession per se.

Finally, returning to the methodology which the IPC will implement, again there are lessons to learn. ABP has traditionally dealt with the overwhelming majority of matters it considers via written representation. The Planning and Development (Strategic Infrastructure) Act 2006 does, however, make provision for oral representation and it is policy to direct the holding of hearings unless the issues are clear cut. The goal is to ensure that relevant information upon which to base decisions is gleaned. In both jurisdictions there has been a significant movement away from public inquiry type approaches which are underpinned by cross-examination. Decisions on the type of approach adopted is at the commissioner's discretion but the guidelines advocate an approach whereby, as far as reasonably possible, hearings are conducted "expeditiously and without undue formality" (ABP, 2010 p. 4). While it is logical to assume that this round table approach, also advocated by the IPC, is more user friendly and less intimidating for those who wish to be heard, evidence suggests that there are structural benefits to be gleaned which once again resonate with professional ethics. The key outcome from the discussions endorsed findings by McKay (2010) that planning arenas are sometimes used by unscrupulous professionals, usually planners or members of the legal profession who, driven by the desire to win for their client, tactically manipulate information "to the point of formulating fiction".

An analogy could be drawn with Foucault's definition of the activities of polemicists who endeavour to take control of the discursive process and prohibit inclusivity by undercutting other parties' rights to engage in meaningful dialogue (Rabinow, 1984). Cross-examination was seen to be the most effective mechanism for polemicists, flagging concerns over the validity of such an approach being adopted by the IPC. To counter this, however, the evidence indicated that commissioners have the skill sets to circumnavigate many of the emerging problems, for example stepping in to protect a non-expert witness when it is apparent that advocates are over-zealous or aggressive in their approach. While there is no absolute remedy to identifying inappropriate knowledge (Alexander, 2008), the flexibility of the mechanism used in both Ireland and N.I., with a presumption in favour of round table discourse, coupled with marshalling by highly skilled inquisitors, is seen as a fair and rigorous approach which provides the opportunity to yield rich veins of information.

Conclusion

The investigation yielded a number of interesting findings which might prove useful not just to government and the IPC but to planning professionals in terms of how they perceive and implement the responsibilities imposed upon them by the RTPI Code of Conduct (2007).

An interesting issue which emerged concerned the legitimacy of the IPC per se. The question raised regarded why the role was not simply passed to the Planning Inspectorate, where there is already a highly skilled and well staffed organisation, probably better geared to dealing with complex infrastructure applications than the IPC. While the only evidence of ulterior motives in formulating a separate body emerged from a small number of comments alluding to circumnavigating regulations and fast tracking permissions, perhaps there is an opportunity to explore this further in the context of concepts relating to the rescaling of the state (Jessop, 2002). There is also, perhaps, merit in drawing from successful operational practice in Ireland and N.I. where the existing appellate organisations have absorbed strategic infrastructure responsibilities and are perceived as working with integrity, speed and relative cost effectiveness. In Ireland, indeed, such rationale was significant in the rejection of the option to introduce a separate institution.

Criticisms by objectors to the establishment of the IPC, condemning its lack of a democratic mandate, seem to be ill founded. The IPC has been legitimised by government, it will follow procedures designed by government and report to elected ministers who make executive decisions. Propositions of illegality too seem fundamentally and fatally flawed as the courts have produced landmark rulings which torpedo the machinations of those seeking to question its legitimacy. Where there is concern over procedural impropriety, ultra vires decisions, or irrationality, a safety valve is provided in the form of the judicial review procedures, though there is evidence that prohibitive financial costs may deter legitimate utilisation of the procedure, thereby "marginalising" (Flyvberg, 2002) those most affected by potential injustice. A final point of interest in this context emerges from the unwillingness of organisations and individuals, who had criticised the new frameworks in the media, to expand or respond to further questioning. One suggestion as to why this might be the case emerged in the evaluation where it was suggested that perhaps the comments are a reaction to a neoliberal agenda (Peck and Tickell, 2002; Jessop 2002) rather than a definitive criticism of a specific procedural component. If this is true it opens up an interesting avenue for future investigation.

Staying with legal matters, in the context of the NPSs the most significant issue investigated related to the SEA process. While the evidence suggested that many questions surround how SEA has been dealt with, particularly in the case of draft NPS 1 as it contains site specifics, the key issue is not solely whether the legislation has been appropriately transposed and implemented through the AoS, but in its absence has adequate expert knowledge been created and appropriate consultation been undertaken? Based upon evidence from DRDNI, while there is no indicator pointing to a legal "fundamental and fatal flaw in procedure", the advice is to proceed with caution, particularly on draft NPS1 "otherwise the lawyers will be sharpening their pencils". Generally, however, the evidence supported the premise that NPSs provide a framework for policy – not decision making - setting out the national "need" for key infrastructure and thus releasing the IPC from deciding on strategic merits. Despite apparent legal compliance, criticism over the ethics of the NPS strategy as a whole prevails and the RTPI has expressed worry that the absence of spatial elements makes informed decisions about the location of infrastructures meaningless (Donatantonio, 2010). Further concerns were raised by the DRDNI respondents who commented that anything less than a full SEA would represent a "dilution of expert knowledge and reduction in critical consultation".

The validity of such concerns are exacerbated by the evidence emerging from this investigation which infers that a significant proportion of professionals serve the interests of their employer regardless of the public good. IPC commissioners must therefore be unerringly committed to delivering their professional responsibilities to the expected standards as it could be argued that there can be few better exemplars of unethical practice than an ill considered decision on a nuclear reactor.

Lack of transparency on matters of policymaking and decision taking raise more ethical questions than answers. There was a definitive disinclination by key respondents to answer on such matters, inferring a reluctance to engage in fearless speech (Foucault, 1983). Nonetheless, such is the importance of these questions that those who provide leadership and wield power must be cognisant of the ramifications of not upholding the ethical standards and principles of legitimacy which justify their position. The professional-political relationship in decision taking is masked in shadow, though this investigation has yielded knowledge inferring that ethical dilemmas face planning practitioners on a daily basis, albeit that most do not perceive it to be a serious issue, as one respondent put it “it’s just part of the job”.

Such perceptions undermine the ethos upon which the profession is founded and must be redressed. Rudimentary knowledge means that only speculation is possible on the dynamic which is located at the hub of policymaking and decision taking, therefore only those interacting at the foci of power truly understand how outputs emerge from interactive discursive processes. The evidence from this investigation did, however, indicate that cognisance must not just be taken of the professional-political relationship but the professional-professional relationship in the wider planning context. While the sample is admittedly small, there is clearly an issue to address with regard to the impact of power on professional ethics. Professionals, whatever their rank, have a responsibility to dissent (Marcuse, 1976) and it is disconcerting to think that where organisational legitimacy (Tilling, 2004) is taken as read, power-laden structures (Tewdwr-Jones and Allmendinger, 1998) may be conducive to the development of an inherent fear to express opinion as it might damage how, at best, they are perceived by their superiors or, at worst, impede career development.

While specifically testing the integrity of professional practitioners is almost impossible, it is vitally important that those who influence decisions at locations where power is wielded hold true to the ethical principles underpinning the profession. Failure to do so will ultimately lead to a catastrophic breakdown of societal approval (Kapland and Ruland, 1992) of the planning profession. Such a scenario may ultimately be conducive to the development and implementation of inappropriate policies and strategies which contribute to the demise of the environment which we strive to protect. Evidence from other jurisdictions suggests that the new infrastructure paradigm for operational practice is generally well placed to face such challenges in terms of “expertise and knowledge” (Sheridan, 2010, p. 10). The findings from this investigation suggest that commissioners and inspectors in the wider planning context are perceived as having the ethical robustness to distance themselves from challenges presented by powerbrokers; and the inherent nature of the approach is such that, unlike advocates who tactically manipulate knowledge or flagrantly misrepresent the truth, commissioners are programmed to use a balance sheet approach underpinned by impartiality (Marcuse, 1976). The task for the IPC commissioners is to remain cognisant of such ethical challenges and match the expectations achieved by their counterparts in other planning decision making arenas.

This investigation has demonstrated that many of the criticisms which have appeared in recent literature, grounded in legislation, consultation and procedure, are warranted. It is, however, clear that there are deeper issues of legitimacy and ethics which are of significance to professional planning practitioners. Planners, as a matter of course, face such challenges on a daily basis and while they may be cognisant of, and sometimes disillusioned by, how power is wielded not only by their professional but political masters, the real challenge is one of self policing. Whilst the professional institute strives to promote integrity, the overarching problem for organisational legitimacy per se is not just one of fostering utilitarianism but nurturing the development of a culture underpinned by ethics.

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